IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 652 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SURESH @ SATOK SHANKARBHAI PASI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MR NN PRAJAPATI for Appellant(s) : 1,
MS HANSA PUNANI, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 19/12/2007

ORAL JUDGMENT

1. The appeal is directed against the judgement and order dated 1.4.2004 rendered by learned Additional Sessions Judge, Fast Track Court,

Ahmedabad(Rural) in Sessions Case No.182/2003.

2. The appellant was the original accused charged with offences punishable under Sections 363, 366 and 376 of the Indian Penal Code. He was convicted for all the said offences and sentenced to undergo rigorous imprisonment for a period of five years and seven years respectively and also directed to pay a fine of Rs. 1,000/- for each of the offence. Substantive sentence were however, made concurrent.

3. As per the prosecution, the appellant on 3.8.2003 had kidnapped the minor girl, daughter of the complainant from his guardianship and had also had sexual intercourse with her against her wish.

4. Jagprasad Budhaibhai Parsi-PW1 was examined at exh.10. He is the father of the victim. In his deposition he stated that on the date of incident he had left in the morning at 7:30 for work. His wife called up on the Mobile phone later on and told him that victim was not traceable. He therefore, lodged complaint with the Satellite police station. The appellant was residing in the neighbourhood. He and victim girl were arrested from a village in Uttar Pradesh. He stated that age of the victim girl on the date of incident was 13 years and 7 months. He produced the original birth

certificate of the victim girl which recorded the date of birth as 21.1.1989.

5. PW-3, exh.13 was the victim girl herself. She stated that on 3.8.2003, upon the appellant telling her to accompany him, she had gone with him. She was taken at different places such as Jivrajpark, Gandhinagar, Dahod, Ratlam where they stayed for two days. From Ratlam they went to Sulemanpura. They had tried to get married before the Court. The appellant had removed her clothes and had intercourse with her on couple of occasions.

   5.1 In the cross examination, she stated that in the Court and at other public places there were may other people present and police persons were also present.

6. PW-6, exh.25 is the deposition of Dr. Bhavinbhai Shyamlal Shah. He had examined the appellant. He had not found any external injury on his body. He was however, given history by the boy about going away with victim girl and staying at different places and having intercourse with victim girl of-course with consent.

7. Dr. Jasbhai Galabhai Vaghela-PW4, exh.31 had examined the victim girl. He also found no external injuries on the body. He however, opined that the Vagina permitted entry of two

fingers. He was also given history by the victim girl of having gone with the appellant and having intercourse with her with consent.

8. One Arunaben Jagdishbhai Purohit-PW8, exh.36 was examined to prove recording of birth of the girl in the Municipal records and the birth certificate issued on the basis of such record.

9. From the available evidence on record, it can be seen that the fact that the appellant had taken away the victim girl with him and had stayed at different places is established beyond doubt. The evidence to this effect is available in form of deposition of victim girl herself. This was corroborated by history given by both the appellant as well as victim girl to the respective Doctors who had examined them. The fact that the appellant had intercourse also seems beyond doubt. The victim girl had given clear deposition to this effect. No serious cross examination was carried out on this aspect of the matter. Additionally medical evidence also suggested that girl was used to sexual intercourse.

10. It is equally true that the victim girl herself had willingly accompanied the appellant. sexual intercourse was also perhaps with her consent. The age of victim girl however is of considerable importance in the present case.

11. The prosecution had produced the birth certificate of the victim girl indicating that she was barely 13 years and 7 months on the date of incident. The name of the victim girl was also mentioned in the birth certificate. Birth Certificate was issued on the basis of contemporaneous record of the Municipality. This was produced and proved before the Court by the employee of the Municipality Arunaben-PW8. Thus, it was established that girl was only 13 years and 7 months on the date when the appellant took her away and stayed with her at different places till they were arrested from a remote village in Uttar Pradesh. The appellant is thus rightly convicted under Section 363 and 366 of the Indian Penal Code. Insofar as Section 376 of the Indian Penal Code is concerned, clearly the girl being below the age of 16 years, her consent for the sexual intercourse was wholly irrelevant. In the present case, I find that the girl was of extremely tender age where she could not have understood the repercussion of her actions. Her act of even willingly accompanying the appellant or consenting to have physical relation with him, cannot absolve the appellant of his criminal acts. Under Section 376 of the Indian Penal Code consent of minor girl below 16 years for sexual intercourse is of no relevance. In the present case, girl was even younger than 14 years. The act of the appellant enticing her out

of care of her legal guardian and having physical relations with her was truly a serious offence. He was therefore, rightly convicted and sentenced to seven years of rigorous imprisonment under Section 376 of the Indian Penal Code. Significantly, the conviction and sentence under Section 363 and 366 of the Indian Penal Code was justified.

12. In the result, appeal fails and same is dismissed.

(Akil Kureshi,J.)

(raghu)